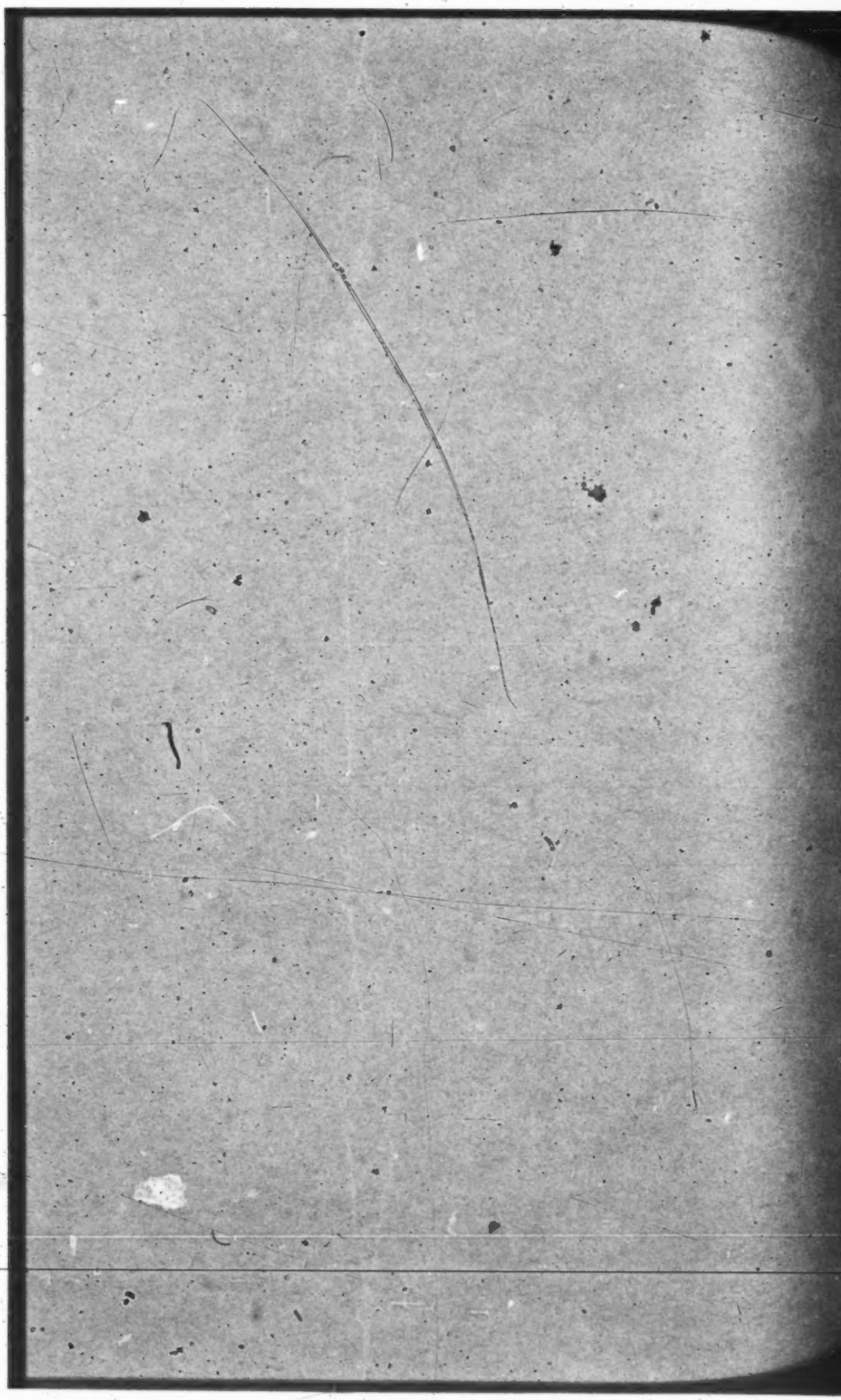

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Supreme Court of the United States.

October Term, 1930.

No. 490.

Frank L. Young Company,
Petitioner,

v.

McNeal-Edwards Company.

BRIEF FOR RESPONDENT.

ASA P. FRENCH,
Attorney for Respondent.

JONATHAN W. FRENCH,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 490.

FRANK L. YOUNG COMPANY,
PETITIONER,

v.

McNEAL-EDWARDS COMPANY.

RESPONDENT'S BRIEF.

STATEMENT OF THE CASE.

The material facts in this controversy are meager, and not in dispute. They are as follows:

In January, 1922, the petitioner, a Massachusetts corporation, hereinafter called the buyer, purchased, through a broker in Baltimore, from the respondent, a Virginia corporation, hereinafter called the seller, a quantity of Crude Menhaden Oil contained in drums, 1107 in number, belonging to the seller (Record, pp. 16, 17).

The contract called for "Prime 'A' Crude Menhaden Oil," and stipulated that the drums should be returned to the seller. They were never returned. The buyer received the oil, paid for it, and subsequently, in or about October, 1922 (p. 16), *brought suit against the seller in the Massachusetts Superior Court,* alleging breach of quality, and *predicating jurisdiction upon an attachment made by it upon, and limited to the value of, the drums in which the oil was shipped*

to the buyer, and which were then on the *buyer's premises, and in its possession* (p. 16). *This suit,* which was the *"original suit,"* was forthwith removed by the seller to the District Court of the United States, counsel appearing "specially" in its behalf, both in the removal proceedings and in the District Court (p. 16).

In March, 1923, *the seller brought a cross-action in the District Court against the buyer to recover the value of the drums attached in the above-named suit, and for their conversion.* While these suits were pending in the District Court, *the buyer, on January 4, 1927* (p. 16), *brought an action in the District Court,* seeking thereby unrestricted jurisdiction, not limited to the value of the containers (p. 16), and made service upon the seller's counsel in the *cross-action.*

Thereafter, to wit, on February 28, 1927, *the buyer discontinued the original action in the District Court* (pp. 16, 73 bot.).

The seller seasonably pleaded in abatement of the present action, in substance, that service, under the circumstances alleged, did not give to the buyer the right to satisfy a judgment, if any, obtained against any property of the respondent except the containers, but for the presence of which in Massachusetts the buyer would have been obliged to bring its original action in Virginia, and that therefore the service attempted to be made upon the respondent's attorney was void and of no effect (p. 17).

A motion to dismiss based upon this plea in abatement was overruled, and the seller answered over, taking proper steps to protect its rights under its special appearance.

In February, 1928, the two cases were tried together, and the buyer had a verdict of $10,730.17; the seller, in its cross-action, recovered $100, and the jury found, specially, that the *fair value of the drums, on September 15, 1922,* the date when they were attached by the buyer, was $1384 (p. 71). The jury also found, specially, that the detention of the

drums by the purchaser *was an unreasonably long detention* (p. 71).

After the verdicts, on February 14, 1928, the seller filed a motion in arrest of judgment which was overruled, and the seller's exception was saved (p. 72).

The seller's petition for appeal was allowed on January 31, 1929, and on the same date it filed its assignments of errors, nine in number, all of which were relied upon except that numbered 6 (pp. 83-84).

Upon the argument of its appeal the seller prevailed on the merits (Opinion of Anderson, J., pp. 86-89), and thereafter, upon reargument, the Circuit Court of Appeals dismissed the case for want of jurisdiction. The buyer thereupon asked this Court to issue its writ of certiorari to review the judgment of the Court of Appeals, and the request was granted.

The seller calls special attention to the fact that, at the time when the buyer's present action was brought, *its* (the buyer's) *original action was still pending and had not been discontinued* (p. 16). The property (drums) described by the petitioner as of "nominal value" was found by the jury, as heretofore stated, to be worth $1384 (p. 71).

I.

The Law Involved.

The case turns principally upon the construction and applicability of Mass. G.L. c. 227, secs. 2 and 3, which are as follows:

> "Section 2. If an action is brought by a person not an inhabitant of the commonwealth or who cannot be found herein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution

in the other. If there are several defendants in the original action, each of them may bring such cross action against the original plaintiff and may be allowed to set off his judgment against that which may be recovered against him and his co-defendants in like manner as if the latter judgment had been against him alone.

"Section 3. The writ in such cross-action may be served on the attorney of record for the plaintiff *in the original action* and such service shall be as valid and effectual as if made on the party himself in the commonwealth."

Upon an analysis of these sections, and of the undisputed facts stated in the record, it appears that the "original action" in this case was the suit brought by the buyer against the seller in the Massachusetts Superior Court, alleging breach of quality. This suit was forthwith removed by the seller to the District Court of the United States.

The Massachusetts statute under scrutiny clearly indicates that the legislature did not contemplate permitting a resident-plaintiff to bring a subsequent suit against a nonresident-defendant enlarging the jurisdiction of the resident-plaintiff's original suit, merely because the nonresident choses to bring a cross-action; and section 3 of chapter 227, establishing the method under which the provisions of section 2 can be taken advantage of, clearly demonstrates this to be true, inasmuch as it provides that the writ in such *cross-action* may be served upon the attorney for the plaintiff in the *original* action. In the case at bar the cross-action was that brought by the nonresident, McNeal-Edwards Company, against the resident-plaintiff, F. L. Young Company, and F. L. Young Company's suit brought in 1922 was the "*original action.*"

The petitioner, F. L. Young Company, insists that its suit now pending was the cross-action, and that the *true*

cross-action, brought by McNeal-Edwards Company, is the original action, and in so doing, among other things, is obliged to ignore the fact that the real "original" action (that of 1922, brought by the petitioner) was pending when it brought its present suit. The seller has, from the beginning, contended that this situation disposes of the buyer's contention that service by it upon the respondent's attorney in the cross-action, gave the petitioner general jurisdiction against the person of the respondent. In neither opinion of the Court of Appeals is there any discussion of this phase of the case.

The record discloses a situation which is unusual, if not unique. On the original argument, upon the merits, the court below was unanimously of the opinion, written by Anderson, J. (pp. 86-89), that the seller was entitled to a verdict on the merits, and an order was entered sustaining the seller's appeal. Subsequently a motion for rehearing was presented, and, on the argument thereof (a majority of the court—*Bingham* and *Wilson*, JJ.; *Anderson*, J., dissenting, p. 112), the judgment of the District Court was vacated, the verdict set aside, and the case dismissed for want of jurisdiction, without prejudice, and without costs (p. 82).

This is the first time, it is diffidently submitted, that an attempt has been made by any court, thoroughly to marshal and analyze all the cases bearing upon the jurisdictional question involved in this litigation. That it has been performed with the learned and painstaking discrimination which such an important question justifies is obvious. Respondent's counsel have been unable to discover any other decisions which throw further light upon the issues presented.

It would be presumptuous and futile for counsel to undertake to improve upon the reasoning of the court and the conclusion to which it leads.

II.

Status of Unanimous Opinion of the Court Below upon the Merits which has been "Superseded."

Counsel for the petitioner has seen fit also to discuss the question decided by the court below upon the merits, and it behooves the respondent's counsel, therefore, to endeavor to meet their contention.

The allegation of error to which Judge Anderson's original opinion was directed was based upon the proposition that the failure of the buyer to return the drums was, under the circumstances, a willful breach of the contract on its part; or, in other words, that it was a willful default in a stipulation of the contract, which barred the buyer's right to recover. It is to be emphasized that the contract, as contained in the purchase-order, and in the broker's note for the sale and purchase of the oil, required the buyer to return the drums to the seller with reasonable promptness, freight prepaid. Instead of so doing, the buyer, by its own deliberate act, or, to use the language of the Massachusetts Supreme Court in *Sipley* v. *Stickney*, 193 Mass. 43, 46, "*by its willful default* in the performance of the stipulation of the contract," deliberately planned, rendered itself incapable of compliance with a material obligation, namely, to return the drums (pp. 83-84), and, on the further ground that it was clearly a breach of the buyer's obligation under the contract, which precludes it from recovery, to perform deliberately any act which made it impossible to fulfill that obligation. If this contention is sound, the buyer had no right by its intentional act to cause the drums to be placed *in custodia legis*, that is to say, under attachment, and to claim that it, the buyer, was consequently unable to return them to the seller. In this connection it is to be noted that it is made a part of the record in this case that the buyer in the case of *McNeal-Edwards Company* v. *F. L. Young Company*, tried with this case, found, in answer to a specific

question propounded to the jury by the court, that the retention of the drums, which, at the time of the trial, had never been returned to the seller, was an unreasonable detention (p. 3).

III.

Was the Breach of Contract on the Part of the Buyer Unintentional or Willful?

Whatever the arguments advanced by counsel for the petitioner, they dwell with most emphasis upon the contention, stated in various ways, that, upon all the evidence, the breach by the plaintiff was not willful. It is respectfully submitted that there is not a particle of evidence recited in the record from which the breach could possibly be held to have been anything other than willful.

There is much in the way of elaboration, but little or nothing, as applied to the admitted facts under scrutiny, which is new and fundamental, in the petitioner's brief in support of its contention. The two questions in the petition as to which counsel address themselves anew are, in substance:

(1) Was the breach by the petitioner of the contract in suit willful or unintentional? and—

(2) Which line of decisions, and which of the doctrinal writers—those relied upon by the petitioner or by the respondent (and they are not reconcilable)—should be followed in determining the main issue (though not the basic issue, which is jurisdictional) involved?

No room for doubt exists with respect to the meaning of the word "willful" as used by the courts, and applied to cases such as this. To choose several from a vast number of available authorities:

> " 'Willful' is a word of familiar use in every branch of the law, and although in some branches . . . it may

have a special meaning, it generally implies, as used in courts of law, nothing blameable, but that the person of whose action or default the expression is used, is a free agent, and that what was done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing, and intends to do what he is doing, and is a free agent."

29 Am. & Eng. Encyc. of Law (1st ed.), pp. 113, 114.

" 'Willfully' is a word generally construed to mean intentionally instead of accidentally."

State v. *Prater,* 139 Mo. App. 348.

"Willfully" is a synonymous term with "designedly," without lawful excuse; not accidentally.

O'Barr v. *United States,* 139 Am. St. Rep. 959.

"A willful act is one that is intentional."

Brown v. *B. & M. R.R.,* 73 N.H. 568.

"Willfully" means "intentionally"; that is, that the person doing the act intended at the time to perform the particular act.

State v. *Smith,* 119 Tenn. 521, *et aliunde.*

Applying these definitions to this case, it is perfectly clear that the retention of the drums for several months after they were emptied, and their attachment by the petitioner, was "by design, intentional, and with a set purpose."

IV.

The Buyer's Retention and Subsequent Attachment of the Drums which it had Promised to Return was not only Intentional, but in bad Faith.

It is clear that when litigation became imminent, somebody, at some time between the date when the drums in issue were emptied and September 15, 1922, the date of the writ and attachment, conceived that it was for the interest of the buyer that the drums should not be returned to the seller as promised, but should be retained and attached, thereby vesting the courts in Massachusetts with jurisdiction.

It was a clever and deliberate plan, suggested to, and adopted by, the buyer, at some time between the emptying of the drums and the bringing of the writ, to disregard its obligation to return the drums, and, in lieu thereof, to cause them to be attached, while on its own premises, in judicial proceedings instituted by its counsel in its behalf, in order that it might sue the seller in Massachusetts, and thus avoid the substantial additional expense and annoyance incident to the bringing of its suit in the seller's domicile.

It is plain that a conscientious regard for the obligations of the contract should have prompted the buyer to do what it had promised to do, namely, to return the drums within a reasonable time.

Self-interest, however, persuaded it to ignore its promise, and thereby to avoid litigation in Virginia and to compel the seller to come to Massachusetts to make its defense and enforce its rights. The buyer's act in attaching the drums was clearly premeditated and in bad faith, and its motive was obvious.

To deny recovery to one who has deliberately and purposely, for his own advantage, broken his promise under an explicit agreement, is not hardship, but just retribution. A better illustration of such a situation could hardly be conceived than the act of this petitioner in attaching the drums which it had agreed to return.

Such retention of the drums for several months after they were emptied, and their attachment by the buyer, was clearly not "unintentional," but by design, intentionally, with a set purpose, and in bad faith. It is difficult, and inconsistent with honest dealing, to justify or palliate the act. No authority is cited by counsel for the petitioner, the application of which defends the petitioner's action in this case; and no court, or textwriter, has gone so far as to assert that, in any jurisdiction, an act analogous to that of attaching the drums would, upon the facts disclosed in this case, be held justifiable.

As to the suggestion made by the buyer that it should formally appear in the printed record that the seller's motion for a directed verdict was in fact disallowed, see—

Chateaugay Iron Company, Pet'r, 128 U.S. 544, 553.

United States v. *U.S. Fidelity & Guaranty Co.*, 236 U.S. 512, 529.

Spokane & Inland R.R. v. *Campbell*, 241 U.S. 497, 502.

Respectfully submitted,

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